# **STATE PERSONNEL BOARD, STATE OF COLORADO**Case No. **2002B045**

#### INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

**BRYAN MIHELICH,** 

Complainant,

VS.

DEPARTMENT OF CORRECTIONS, ARROWHEAD CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on January 2, 2002 at the Division of Administrative Hearings, 1120 Lincoln, Suite 1400, Denver, Colorado. Assistant Attorney General Andrew Katarikawe represented Respondent. Respondent's advisory witness was Warden Donice Neal, the appointing authority. Complainant appeared and represented himself.

## **MATTER APPEALED**

Complainant, Bryan Mihelich ("Complainant" or "Mihelich") appeals his indefinite suspension without pay by Respondent, Department of Corrections, Arrowhead Correctional Facility ("Respondent" or "DOC").

For the reasons set forth below, Respondent's action is **affirmed**.

#### ISSUES

- 1. Whether Complainant committed the acts for which he was disciplined;
- 2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
- 3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
- 4. Whether attorney fees are warranted.

### **FINDINGS OF FACT**

#### **General Background**

- 1. Complainant has worked at Arrowhead Correctional Center since 1991 as a Correctional Officer I ("COI"). Donice Neal is the Warden for the Canon Minimum Centers ("CMC") and is Complainant's appointing authority. Cynthia Wickham ("Wickham") is Complainant's common law wife.
- 2. One of the minimum requirements for a COI position is the ability to use a firearm and certification in firearm usage. This requirement is necessary for all COIs given the general nature of the duties of a COI; so that COIs can fill in for fellow officers who are out on leave; and in case of emergency situations at CMC.
- 3. The line staff at CMC are not typically armed when working at their assigned posts. Officers working in the external security unit are armed.
- 4. Any officer whose certification has lapsed may be certified to use firearms within four hours. In the past, officers needed to be certified every six months or annually. Complainant was last certified seven years ago.
- 5. Since December 2000, Complainant has been under a "firearms disability" (a prohibition, under 18 USC § 922(g), against an individual possessing or carrying a firearm, if he or she has been convicted of, or received a deferred sentence or probation on, a domestic violence related offense or is subject to a restraining order).

#### First Incident Involving Wickham

- 6. During December 2000, Complainant was involved in an altercation with Wickham. Wickham claimed Complainant threw a phone, breaking a glass door. There were no allegations of a physical assault by either Complainant or Wickham.
- 7. As a result of the December 2000 incident, Complainant was arrested and held in jail for twelve hours on charges of criminal mischief, 1<sup>st</sup> degree criminal tampering and domestic violence. A restraining order was entered against him as a result of this arrest. The restraining order was vacated in January 2001.
- 8. By letter dated December 28, 2000, Complainant was notified by Michael Rulo, DOC's Inspector General, that Complainant had a firearms disability. Rulo's letter went on to state that Complainant must show a copy of the letter to Complainant's supervisor whenever his assigned duties at DOC required the possession or use of a firearm.

- 9. On February 14, 2001, Neal sent Complainant a letter scheduling an R-6-10 meeting for February 22, 2001 to discuss his arrest for the December 2000 incident.
- 10. The R-6-10 meeting was held on February 22, 2001. Complainant was given no corrective or disciplinary action as a result of the R-6-10 meeting.
- 11. The trial on the December 2000 incident was scheduled for January 15, 2002, subsequent to the hearing on this state personnel matter.

#### **Second Incident Involving Wickham**

- 12. On October 19, 2001, Complainant was involved in another altercation with Wickham. Wickham called the police who arrested Complainant, charging him with third degree assault and domestic violence.
- 13. As a result of his arrest, Complainant was held in jail for eleven days. During that time, he was held in a medical hold cell and came into no contact with other inmates. In addition, a restraining order was entered against him.
- 14. By letter dated October 19, 2001, by Inspector General Rulo notified Complainant that Complainant had a firearms disability. Rulo's letter went on to state that Complainant must show a copy of the letter to his supervisor whenever Complainant's assigned duties at DOC would require the possession or use of a firearm.
- 15. On October 29, 2001, Neal sent Complainant a letter scheduling an R-6-10 meeting for November 5, 2001.
- 16. Following Complainant's release from jail on October 30, 2001, DOC suspended him with pay pending further investigation.
- 17. Neal held the R-6-10 meeting on November 5, 2001. During that meeting Complainant told Neal about Wickham's erratic behavior over the past year, her severe weight loss; her past history of drug usage; his suspicions, as well as those of many of his friends, that Wickham was again taking illegal drugs; that Wickham had stolen approximately \$4,000 from him resulting in criminal fraud charges; and that she had assaulted him on numerous occasions. Complainant denied that he had ever physically abused or assaulted Wickham and stated that he had been planning in October 2001 to obtain a restraining order against Wickham.
- 18. During the R-6-10 meeting, an acquaintance of Complainant's told Neal that during the summer of 2001, Wickham, while at a bar, grabbed Complainant; slapped him across the face and that Complainant responded by walking away. In addition, the acquaintance stated that a fellow employee had witnessed a similar incident a week prior to the incident he witnessed.

- 19. Prior to imposing discipline, Neal reviewed DOC's administrative regulations concerning the Staff Code of Conduct and firearms authorization.
- 20. Aggravating factors which Neal considered prior to imposing discipline included the length of time that Complainant spent in jail; the continued lack of flexibility in scheduling Complainant due to his firearms disability; the possibility that inmates would learn of Complainant's being held in jail; and that there were allegations of Complainant having physically hurt Wickham in the second incident.
- 21. In deciding on what discipline to impose, Neal considered demoting Complainant, reducing his pay and terminating him. However, because Complainant was a COI, it was not possible to demote him; reduction of pay did not address the issues of alleged physical violence or his firearms disability; and, termination was not appropriate, given that there had not been a final determination of the charges against Complainant.
- 22. By letter dated November 6, 2001, Neal informed Complainant that she was imposing discipline against him in the form of an indefinite disciplinary suspension without pay pending final disposition of the criminal charges against him.
- 23. Sometime in March 2002, Complainant will go to trial on the October 2001 incident. At the time of Complainant's state personnel hearing, Wickham had a temporary restraining order against Complainant. A hearing was scheduled for January 22, 2002, subsequent to the hearing on this state personnel action, to determine whether the restraining order should be made permanent.
- 24. Complainant seeks reinstatement, back pay and benefits.

### **DISCUSSION**

#### I. GENERAL

Certified state employees have a property interest in their positions and may only be terminated for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

### II. HEARING ISSUES

## A. Complainant committed the acts for which he was disciplined.

Complainant was disciplined based upon his firearms disability, the factual allegations underlying his arrest and the length of time he spent in jail as a result of that arrest. At hearing it was undisputed that Complainant was under a firearms disability, the incident in question involved an allegation of physical violence involving Complainant, and that Complainant spent eleven days in jail. Complainant presented evidence that he had not physically assaulted Wickham. However, he did not present any evidence that negated the evidence that the charges on which he was arrested were based upon allegations of physical violence. The issue of whether or not Complainant actually physically assaulted Wickham is not an issue for determination in the context of this hearing. That determination is to be made in the criminal proceeding arising from the charges against Complainant. The issue in this matter is whether Complainant committed the acts for which he was disciplined. In this case, those acts are his firearms disability, an allegation of physical violence and time spent in jail as a result of an arrest. None of the evidence showed that Complainant did not commit these acts. Complainant committed the acts for which he was disciplined.

## B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Van de Vegt v. Board of Com'rs of Larimer County*, 55 P.2d 703 (Colo. 1936) and *Lawley v. Dep't of Higher Educ.*, No. 00SC473, slip op. (Colo. December 3, 2001).

The credible evidence shows that the appointing authority thoroughly investigated the evidence before her, considered the evidence presented by the Complainant and then, after consideration of that evidence, exercised her discretion in a reasonable, fair and honest manner. Therefore, she did not act in an arbitrary or capricious fashion.

If an employee violates agency rules, then that employee may be subjected to disciplinary action. Board Rule R-6-9, 4 CCR 801. In addition, if the employee is charged with an offense that has an adverse affect on the agency, that employee may be placed on indefinite disciplinary suspension. Board Rule R-6-9(A), 4 CCR 801. If the employee is not convicted or the charges are dismissed, the employee is restored to the position and granted full back pay and benefits. Board Rule 6-9(A), 4 CCR 801.

Under DOC's Staff Code of Conduct, it is considered conduct unbecoming if an officer engages in conduct, either on or off duty, which affects job performance or reflects poorly on DOC. Such conduct subjects the officer to corrective and/or disciplinary action. In addition, DOC officers must exercise good judgment and sound discretion in their off duty conduct and may not associate or deal with persons known suspected of being involved in illegal acts. DOC AR 1450-01(IV)(N), (W), and (ZZ).

Complainant had had previous altercations with Wickham. As a result of the October 2001 incident and the resultant restraining order, Complainant was once again under a firearms disability as a result of an altercation with Wickham. The firearms disability affected his job performance at DOC in that there is less flexibility in scheduling Complainant, he is unable to fully assist in emergency situations and he is unable to assist in coverage for officers who staff armed posts. With the October 2001 incident resulting in a firearms disability, Complainant's job performance was adversely affected for the second time in ten months. This in turn has an adverse affect on DOC in performing its functions.

As a result of allegations by Complainant that Wickham stole \$4,000 from Complainant, criminal fraud charges are pending against Wickham. Complainant testified that he and many of his friends have strong suspicions that Wickham is using illegal drugs. Complainant was aware of all this but continued to interact with Wickham. He was associating with someone who, at best, he suspected of being involved in illegal acts.

It should be noted that, DOC argues that Complainant violated the DOC administrative regulation on Firearms Authorization, AR 300-46RD. A review of that regulation shows that it is based on 18 U.S.C. § 922(g). Under that federal law, an individual may not possess a firearm if he or she has been convicted of a domestic violence charge or is under a court ordered restraining order. Under DOC's administrative regulation, employees who have been convicted of a domestic violence related charge are subject to termination. There is no provision for dealing with employees who are under a firearms disability as a result of a restraining order. Therefore, DOC's administrative regulation on Firearms Authorization is inapplicable to this matter and is an inappropriate basis for disciplinary action against Complainant.

Complainant's second firearms disability in less than a year, the history of altercations in his relationship with Wickham resulting in escalating criminal charges against Complainant, Complainant's knowledge of the criminal charges of fraud against Wickham and Complainant's repeated assertions of his suspicions that Wickham was using illegal

drugs all violate DOC's Staff Code of Conduct and adversely affect the agency. Complainant has violated his agency's rules and is, therefore, subject to discipline. Board Rule R-6-9, 4 CCR 801. The charges against Complainant which have resulted in his firearms disability have adversely affected DOC, therefore he may be subjected to indefinite suspension without pay pending the outcome of the criminal charges. Board Rule R-6-9(A), 4 CCR 801. If those charges are dismissed or he is not convicted, he should be restored to his position and granted full back pay and benefits. Board Rule R-6-9(A), 4 CCR 801.

## C. The discipline imposed was within the range of reasonable alternatives

In taking disciplinary action, an appointing authority must take into consideration, among other things, the nature, extent, seriousness and effect of the act, the period of time since a prior offense and mitigating circumstances. Board Rule R-6-6, 4 CCR 801. In this action, the appointing authority considered a range of potential disciplinary actions, including pay reduction, demotion and termination.

Complainant, at the time of this disciplinary action, was under a firearms disability as a result of his interaction with Wickham. This disciplinary action involved a second incident between Complainant and Wickham in less than ten months. Neal did not impose a corrective or disciplinary action in the first incident and, while under his first firearms disability, Complainant's assignments were made so as not to conflict with that disability. However, in investigating the second incident, many aggravating factors came to light.

These factors include an allegation of physical violence by Complainant against Wickham; a second firearms disability for Complainant within ten months; Complainant's disclosure that he believed Wickham to be engaged in illegal activities, including fraud and drugs; and a jail stay of a number of days. None of these factors were present in the December 2000 incident of the appointing authority was not made aware of them. Their presence makes it reasonable for Neal to impose some form of disciplinary action, rather than a corrective action, in that they affect Complainant's job performance more seriously than the December 2000 incident. Complainant serves as a COI, supervising inmates at DOC. As such he is a role model for inmates. Allegations of resorting to violence, spending time in jail as a result of those allegations, associating with someone he strongly suspects of illegal acts and who is charged with criminal fraud as a result of Complainant's allegations does not serve to fulfill his function as a role model. This in turn has an adverse impact on DOC.

The potential forms of discipline should be considered in light of these factors. Neal considered reduction in pay, demotion, suspension and termination. Complainant worked as a COI. As testified to by Neal and undisputed by Complainant, there was not a classification below COI into which he could be demoted. A reduction in pay would not address Complainant's firearms disability or the burden it would place on DOC in scheduling around that disability. In addition, a reduction in pay would not address the potential difficulty of having Complainant supervise inmates who may be aware of the

allegations of physical violence, his time in jail and the pending charges against Complainant.

In light of the pending nature of the charges against Complainant, termination would have been too harsh a discipline. Neal's disciplinary letter specifically states that upon resolution of the criminal charges, a final decision will be made regarding disciplinary action. Such action is in line with the balance struck by Board Rule R-6-9(A), protecting a wrongfully charged employee with reinstatement and full back pay and benefits, while providing for protection of an agency's interests.

The credible evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the circumstances of the situation as well as complainant's individual circumstances. The choice to suspend Complainant without pay indefinitely is within the range of reasonable alternatives given DOC's concerns and the aggravating factors present in the October 19, 2001 incident. In addition, it is an action contemplated within the Board Rules under such circumstances as are present in this action.

#### D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. Given the above findings of fact an award of attorney fees is not warranted.

## **CONCLUSIONS OF LAW**

- 1. Complainant committed the acts for which he was disciplined.
- 2. The discipline imposed was within the range of reasonable alternatives.
- 3. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
- 4. Attorney's fees are not warranted.

## ORDER

Respondent's action is **affirmed.** Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 19<sup>th</sup> day of February, 2002.

Kristin F. Rozansky Administrative Law Judge 1120 Lincoln Street, Suite 1400 Denver, CO 80203 303-764-1400

#### NOTICE OF APPEAL RIGHTS

#### EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

#### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

#### **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

#### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on  $8 \square$  inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

#### ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

## **CERTIFICATE OF SERVICE**

This is to certify that on the day of Feb foregoing INITIAL DECISION OF ADMINISTE APPEAL RIGHTS in the United States mail, po	RATIVE LAW JUDGE and NOTICE OF
Bryan Mihelich 1017 N. Elizabeth Pueblo, Colorado 81003	
and in the interagency mail, to:	
Andrew Katarikawe Assistant Attorney General Employment Law Section 1525 Sherman Street, 5 <sup>th</sup> Floor Denver, Colorado 80203	
	Andrea C. Woods